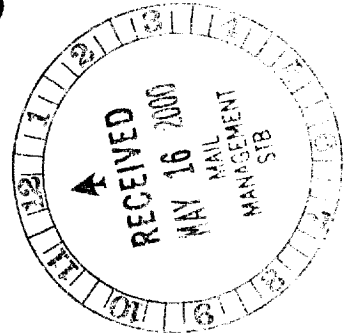


198571



May 16, 2000

Surface Transportation Board
Office of the Secretary
Case Control Unit
Attn: STB Ex Parte No. 582 (Sub-No. 1)
1925 K Street, N.W.
Washington, DC 20423-0001

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Office of the Secretary

MAY 16 2000

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Re: STB Ex Parte No. 582 (Sub-No. 1), Major Rail Consolidation

Dear Secretary:

Enclosed for filing in the above-captioned docket are the original and twenty-five copies of the Comments of Consumers United for Rail Equity (CURE). Also enclosed is a 3.5 inch IBM compatible floppy disk containing an electronic copy of the Comments in WordPerfect 8.0, which is convertible to WordPerfect 7.

Thank you for your consideration.

Sincerely,



Robert G. Szabo
Executive Director and Counsel

198571



Ex Parte No. 582 (Sub-No. 1)

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**SURFACE TRANSPORTATION BOARD
PROCEEDING TO MODIFY REGULATIONS
AT 49 CFR PART 1180, SUBPART A,
GOVERNING PROPOSALS FOR
MAJOR RAIL CONSOLIDATIONS**

ENTERED
Office of the Secretary

MAY 16 2000

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COMMENTS OF CONSUMERS UNITED FOR RAIL EQUITY

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May 15, 2000

I. Statement of interest in the proceedings.

Consumers United for Rail Equity (CURE) submits these comments to the Surface Transportation Board (STB) on modifications to the STB's regulations governing proposals for major railroad consolidations.¹ CURE filed notice of its intent to participate in this proposed rulemaking on April 6, 2000.

CURE is a coalition of rail shippers, including public power generators, rural electric cooperatives, investor owned electric utilities, coal producers, chemical and petrochemical companies, that rely on rail transportation but are sometimes "captive" to a single railroad for at least some of their rail movements.² CURE advocates federal policies that will promote competition and increase efficiencies in the rail industry.

CURE presented testimony before the STB during its March, 2000 hearings on major rail consolidations. Like many who testified during those proceedings, CURE contends that the STB must change its merger policy and other policies to more effectively promote and enhance competition, thereby protecting the public interest. These comments request that the STB take

¹ The STB's regulations governing proposals involving the merger or control of two or more Class I railroads are codified in the Code of Federal Regulations at 49 CFR Part 1180, subpart A.

² CURE's membership includes the following: Algona Municipal Utilities; American Electric Power Service Corporation; American Public Power Association; Arizona Electric Power Cooperative; Arkansas Electric Cooperative Association; Buckeye Power, Inc; Camelot Coal Company; Caroline Power and Light Company; Consumers Energy Company; Dairyland Power Cooperative; Edison Electric Institute; Empire District Electric Company; Entergy Services, Inc.; Ethyl Corporation; Exelon Corporation; Kansas City Power and Light Company; Minnesota Power; Municipal Electric Systems of Oklahoma; National Rural Electric Cooperative Association; Nebraska Public Power District; The Ohio Valley Coal Company; Potomac Electric Power Company; Shawnee Coal Company; Southern Indiana Gas and Electric Company; Sunoco, Inc.; Western Fuel Association; and Wisconsin Power and Light Company.

specific action to improve competition in the rail industry, which we believe will benefit both rail customers and the overall health of the rail industry.

II. CURE recommends that the STB change its merger policy and other policies to protect shippers and promote effective competition.

CURE agrees with the STB that the rapid consolidation of the major railroads in North America warrant a review of and changes to STB's policy for reviewing Class I railroad mergers. CURE further believes that, given the current trend in the rail industry, the STB must reach beyond changes to its merger policy and institute additional rulemakings to meet its statutory charge of promoting national rail policy that fosters effective competition.³ CURE believes the following changes to current STB policy are warranted.

First, CURE asks the STB to adopt rules that will increase scrutiny of mergers for their impacts on competition. Under its statutory rules for major rail mergers and consolidations, the STB considers, among other things, a proposed merger's effect "on the adequacy of transportation to the public,"⁴ "whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system,"⁵ and the merger's impact on "the public interest,"⁶

Under the "public interest" standard, the STB currently performs a balancing test and weighs the benefits to the applicants and the public against any potential harm to the public. The STB regulations identify two types of

³ 49 U.S.C. Section 10101

⁴ 49 U.S.C. Section 11324(b)(1)

⁵ 49 U.S.C. Section 11324(b)(5)

⁶ 49 U.S. C. Section 11324(b)(2)

potential harm: reduction of competition and harm to essential services.⁷ Yet, the current merger policy that has resulted in the rapid consolidation of the major railroads to seven Class I railroads in North America⁸ has failed, we believe, to produce a system that promotes effective competition and good service at reasonable rates. As CURE's comments in this proceeding will chronicle, shippers, short line and regional railroads, Congress and others are growing increasingly dissatisfied with the adequacy of service, unnecessarily high rates, and policies that retard the growth of competition in the rail industry. We believe that new pro-competitive policies are needed to protect the public interest, whether or not additional mergers occur. CURE believes these new policies should include the following:

First, to address effectively the concerns of shippers in merger proceedings, the STB must strengthen its merger review policy and promulgate specific guidelines for evaluating each merger's impact to competition. Specifically, CURE asks the STB to change its merger review policy and apply the following requirements as a precondition to future mergers or consolidations between major railroads:

1. a demonstration that an increase in competitive options will be available to shippers following a merger;
2. a requirement that no merger will be approved that reduces transportation alternatives available to any current railroad

⁷ The regulations state, "if two carriers serving the same market consolidate, the result would be the elimination of the competition between the two. Even if the consolidating carriers do not serve the same market, there may be a lessening of potential competition in other markets. While the reduction in the number of competitors serving a market is not in itself harmful, a lessening of competition resulting from the elimination of a competitor may be contrary to the public interest." (49 CFR 1180.1(c)(2)(I)).

⁸ Burlington Northern and Sante Fe Rail Company; Union Pacific Railroad Company; Norfolk Southern Railway Company; CSX Transportation Incorporated; Kansas City Southern Railway Company; Canadian National Railway Company; and Canadian Pacific Railway Company

customers, and this includes an analysis beyond any "bottleneck" affecting a rail shipper;

3. a requirement that no merger will be approved that fails to provide additional options and enhanced service for railroad customers.

These merger conditions are necessary to promote competitive markets and are within STB statutory discretion to impose.⁹ Furthermore, these additional threshold determinations are consistent with the STB's statutory duty to act in the public interest and promote a national rail policy that enhances competition.

Second, CURE asks the STB to adopt rules that will change the current bottleneck policy, remove the "monopoly abuse" test from competitive access determinations, as well as enhance the ability of regional and short line railroads to evolve as effective competitors and providers of rail service. The major railroad industry has contracted to the point that a simple change in STB's merger policy that will correct the problem in future mergers is, in itself, inadequate to promote the development of adequate competition in the current national rail system. Existing policies that apply to all major railroads and discriminate against competition must also be reviewed and changed. Specifically, CURE asks the STB to take the following actions:

1. reverse its current policy regarding bottlenecks and adopt a new policy requiring railroads to quote a rate between any two points on its system where traffic can originate or be interchanged;
2. affirmatively grant the right of Class I and small railroads to interchange at terminal areas and interchange points without being disadvantaged in any way in terms of operations or pricing;
3. eliminate all "paper barriers" that arbitrarily restrict full interchange rights for Class II and III railroads.

⁹ The STB's regulations explicitly recognize that "the Board has broad authority to impose conditions on consolidations, including those that might be useful in ameliorating potential anticompetitive effects of a consolidation."

CURE requests that these changes to STB policy be adopted as a condition of any future rail merger in which the application is filed after January, 2000. CURE further requests that these changes apply as general regulatory policy for all major railroads. Toward that end, CURE requests that the STB initiate a proceeding to identify and eliminate present policies that discriminate against shippers and regional and short line railroads and prevent rail transportation alternatives.

Third, where the STB lacks statutory authority to institute a rule change, CURE requests that the STB notify Congress of its lack of statutory authority to adopt a specific reform necessary to protect shippers and enhance competition. In addition, where substantial testimony in STB Ex Parte No. 582 proposes a specific change in policy and the STB lacks authority to effect that change, we request that the STB, in its final rule in this proceeding, identify the requested change and state whether the requested change, if not made, was rejected as a matter of policy or due to a lack of statutory authority.

III. The public record established in STB Ex Parte No. 582 supports affirmative action to adopt new policies that promote competition and protect shippers.

The message remains the same from virtually any forum that has examined major rail policy in the past decade – shippers and short line and regional railroads are frustrated by the lack of competition in the national rail system. STB's current policies allow the major railroads to exercise anti-competitive market power. This message was particularly evident during the STB's March, 2000 hearings on the consolidation of the major rail industry in North America.

In its recent Ex Parte No. 582 hearing on rail consolidation in North America, the STB received written comments from over 300 interested parties, and heard testimony from approximately 150 witnesses. Electric utilities that rely on railroads for the movement of coal to generation facilities, chemical companies, agricultural producers and other shippers that rely on rail transportation were uniform in their criticism of current conditions in the rail industry.

Electric utility companies face radical change with the onset of competition in both wholesale and retail electricity markets. With approximately 50 percent of the electricity in the nation generated at coal fired power plants, electric utilities fear that many of the economic benefits of electric competition will be lost if fuel transportation is not competitive. The major competing fuel for electric generators, natural gas, moves in a deregulated national pipeline system. Chemical companies in the U.S. are similarly frustrated. Chemical traffic ranks second to coal in terms of rail tonnage originated and provides carriers with approximately \$5 billion in annual freight revenue. Chemical companies in the U.S. compete globally. Their ability to remain cost competitive in the international marketplace is severely compromised by rail policies that stymie competition and inflate transportation costs. These concerns have led both electric utilities and chemical companies to ask the STB to expand its merger policy to the broadest extent possible in order to consider all possible issues of market power, loss of competition and the downstream effects of a proposed merger.

Of particular concern to electric utilities and chemical companies is the STB's current bottleneck policy. As the testimony of the Chemical Manufacturer's Association in this proceeding stated, 63 percent of the chemical plants in the nation that depend on rail transportation are captive to one rail

provider. One electricity provider, MidAmerican Energy Company, indicated in their STB comments that, over the past 15 years, they have been actively attempting to obtain competitive rail rates for coal transportation to their generation plants. As a result of the STB's bottleneck decision, MidAmerican has been unable to obtain competitive rates from the Union Pacific for a portion of its route from a power plant in Neal, Iowa. At another plant, MidAmerican has had to build a separate rail line in order to relieve its captivity to Burlington Northern and Santa Fe.

Other utilities and chemical plants filing Comments in this proceeding expressed similar concern that the STB's current bottleneck policy inhibits competition and inflates transportation rates. The chemical industry operates in a highly competitive worldwide market. The utility industry operates in a competitive marketplace for the wholesale sale of electricity and are moving quickly into a competitive marketplace for the retail sale of electricity. Both of these industries recognize that competition is the key to economic survival in our nation's modern economy. Competition spurs innovation, lowers prices, improves customer service, and stimulates investment. These benefits could be available to the railroad industry if the STB were to reverse its bottleneck decision and require railroads to quote a rate to the nearest interchange point.

Short line and regional railroads also voiced strong concern in this proceeding that current STB policies are suffocating the development of regional competition. Short line and regional railroads are an important and growing component of the railroad industry. They operate and maintain 29 percent of the American railroad industry's route mileage. As the major rail industry consolidates, regional and short line railroads will be critical to maintaining and creating competitive options for shippers. Unfortunately, as the American Short Line and Regional Railroad Association (ASLRRA) stated in its February 29,

2000 comments to the STB, "today's railroad industry, driven by Class I railroad policies and actions post-Staggers, has minimized rather than maximized rail routing options."¹⁰ For this reason, the ASLRRA has asked the STB to adopt policy that will assure the right of small railroads to interchange with Class I carriers at junctions and terminal areas without being disadvantaged by operating terms or pricing; to remove artificial "paper barriers," restrict arbitrarily full interchange rights, and to preserve gateways to the extent that they are reasonably efficient.

Importantly, the ASLRRA also asked the STB to require Class I railroads, as a condition of merger, to quote proportional rates on the Class I segment of a route that will enable small railroads to quote competitive rates for the entire movement. Like rail shippers, regional and short line railroads understand that a change in the STB's current bottleneck policy is critical to developing competitive options in a future rail industry controlled by a few Class I railroads.

Finally, just as rail customers and short line and regional carriers are critical of current railroad policy, federal agencies expressed their concerns with present conditions in the March proceeding at the STB. In its comments to the STB, the Department of Agriculture indicated that "the railroad mergers and consolidations of the past decade have had serious effects upon the availability of rail transportation for the agriculture industry. Increased market power derived from those railroad consolidations have allowed Class I railroads to dictate changes in prices and service terms which are detrimental to shippers, agricultural producers and rural communities."¹¹ The USDA concludes that the

¹⁰ Statement of Frank K. Turner, President, American Short Line and Regional Railroad Association. STB Ex Parte No. 582, Public Views on Major Rail Consolidations, February 29, 2000. Page 7.

¹¹ Statement of Michael V. Dunn, Undersecretary, U.S. Department of Agriculture. St. Ex Parte No. 582 Public Views on Major Rail Consolidations, February 29, 2000. Page 8.

STB needs to adopt policies that promote effective competition – "the kind of competition that minimizes the number of captive shippers."

The Department of Transportation voiced similar concerns in its comments when it said, "the potential for a national rail duopoly is the major competitive issue in assessing the future of the industry and its impact on the public interest."¹² The Department of Transportation supports the STB's decision to consider the impacts that the proposed BNSF/CN merger will have on the industry as a whole, and points out that "an agency faced with new developments or in reconsideration of the relevant facts and its mandate, may alter its past interpretations and overturn past administrative rulings and practice." CURE agrees. The changes wrought in the rail industry during the past decade have dramatically reduced competitive options for shippers. The comments and concerns raised during this proceeding strongly support the STB rethinking its policy regarding bottlenecks, interchange and terminal access, and paper barriers and enacting new policies that promote, rather than undercut, competition.

IV. The public record established in other venues support affirmative action to enact new policies that promote competition and protect shippers.

The March, 2000 hearings on major rail consolidations do not mark the first instance in which shippers have registered complaints with respect to the STB's rail policy. Two General Accounting Office (GAO) reports and numerous Congressional hearings have all provided rail shippers the opportunity to build the record that the STB's current policies fail to protect shippers adequately and fail to promote effective and appropriate competition in the rail industry.

¹² Statement of the U.S. Department of Transportation, Ex Parte No. 582, Public Views on Major Rail Consolidation, February 29, 2000. Page 9.

In two reports issued in 1999,¹³ the GAO detailed shipper dissatisfaction with current rail service and the lack of competitive options. An estimated 63 percent of shippers responding to GAO's survey (329 of 525 respondents) indicated that the overall quality of their rail service was worse in 1997 than it was in 1990. Shippers also indicated that the quality of service provided by the railroads has decreased relative to the amount paid for that service and attributed service problems to a lack of competitive alternatives to rail transportation. Finally, 71 to 75 percent of the rail shippers surveyed believed increased access to short line and regional railroads, reciprocal switching agreements and bottleneck relief would improve competitive options for rail shippers. The concerns raised and remedies suggested by shippers in the GAO report are the same concerns raised in this proceeding. Certainly, the testimony in this proceeding suggests that the problems identified in the 1999 GAO reports continue today. As the STB examines the framework by which future rail consolidations will be considered, the remedies to instill effective competition – a change in the bottleneck policy, fair access at interchange points, and removal of paper barriers – are the same remedies called for by shippers in the GAO report.

Congress has also heard repeatedly the concerns of shippers and has responded in several instances by asking the STB to take action. As early as 1988, 14 members of the Senate Commerce Science and Transportation Committee, including current Chairman McCain, wrote the Interstate Commerce Commission (ICC) regarding captive shipper concerns. In that letter, these 14 Senators asked ICC Chairman Gradison to "assure that the Commission is discharging its responsibility to preserve and provide competitive railroad

¹³ Railroad Regulation: Current Issues Associated with the Rate Relief Process, GAO (February 1999); Railroad Regulation: Changes in Railroad Rates and Service Quality Since 1990, GAO (April 1999).

alternatives." A decade later, in a March 31, 1998 hearing before the Senate Commerce Committee, several Senators called on the STB to adopt policies that would provide shippers with protections against increasing market power.¹⁴

Most recently, in a March 23, 2000 hearing, Senate Commerce, Science and Transportation Committee members observed that customers have lost faith in the major rail industry and urged both the Congress and the STB to take action to restore confidence and competition in the rail industry. These same remarks have been repeated numerous times over the past decade in the House of Representatives.

The STB should enact policies that will promote competition in this new environment. Where it lacks the authority, the Board should indicate as such to Congress promptly and specifically.

V. CURE's request for changes in STB policy will promote competition and protect shippers while remaining consistent with the Staggers Act's goal of deregulating the rail industry.

The Staggers Rail Act of 1980 established federal policy that freight railroads would be governed, where possible, by competition and the demand for services rather than by regulation to establish reasonable rates. The changes to

¹⁴ The outgrowth of that 1998 hearing was a two-day STB proceeding regarding competitive access issues. In its report back to Congress following these hearings, the STB demurred on taking any concrete remedial action to resolve competitive access issues. In a December 21, 1998 letter to Senators McCain and Hollings, the STB indicated that "so-called 'bottleneck cases,' which involve issues related to competitive access, are still being reviewed in court. For those reasons, although the Board has moved aggressively to adopt new rules described above to open up access during times of poor service, the Board does not plan to initiate administrative action to otherwise revisit the competitive access rules at this time." The STB's bottleneck decision was affirmed by the U.S. Court of Appeals for the Eighth Circuit in MidAmerican Energy Co. v. Surface Transportation Board Nos. 97-1081 (February 10, 1999).

STB policy that CURE is seeking in this proceeding are consistent with that policy.

An enhanced merger review standard that focuses on impacts to competition fulfills the STB's obligation to protect the public interest while at the same time focusing greater scrutiny on the potential anti-competitive impacts of an industry that has consolidated to a point unimaginable to most industry observers twenty years ago when the Staggers Act first became law. The STB could also promote competition by changing its bottleneck decision. Real competition is thwarted when a very few major railroads can carve out and dominate vast reaches of the nation. Without clear policy that forces these railroads to quote competitive rates over a portion of their lines, shippers will remain captive and subject to predatory pricing and poor service. Ultimately shippers, where possible, will look to other transportation alternatives, to the eventual financial detriment of the major railroads. Finally, in a future of very limited major railroad alternatives, it becomes increasingly important that new policies be adopted that create strong, viable regional and short line railroads. These are the future competitors and niche providers that are necessary for a healthy national railroad industry.

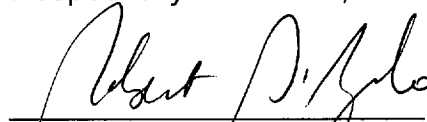
VI. Conclusion.

CURE strongly agrees with the STB in its statement of advance notice of proposed rulemaking that "the time has come to consider whether rail merger policy should be altered to place greater emphasis on enhancing, rather than simply preserving, competition." Based on the testimony on record in this proceeding, shippers, regional railroads, federal agencies, the GAO and members of Congress have reached the conclusion that policies that enhance competition in the rail industry are desperately needed. In order to foster

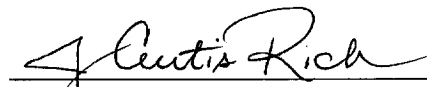
competition effectively, the STB must reach beyond a narrow change in its merger review standard to adopt policies that promote competition for all railroads.

The rail industry is at a critical juncture. CURE asks the STB to take strong action and make effective competition the centerpiece of rail policy. Merger policy focused on impacts to competition, rules that allow competitive alternatives to develop for captive shippers, and actions that create healthy regional railroads throughout the U.S. are all necessary components of a pro-competition national rail policy for the 21st century. If the STB lacks the authority to act, it must give Congress the direction Congress needs to broaden STB's authority so that the nation will have a comprehensive rail policy that maintains railroad healthy while providing transportation competition for shippers.

Respectfully Submitted,



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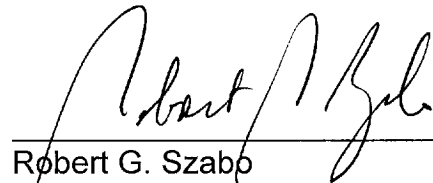


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May 15, 2000

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of all filings submitted so far in this proceeding by the Consumers United for Rail Equity upon each person added to the official service list compiled by the Secretary in this proceeding by first-class mail, postage pre-paid.

Dated at Washington, D.C. this 15th day of May, 2000.



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